

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Amendment of the Commission's Space Station
Licensing Rules and Policies

IB Docket No. 02-34

2000 Biennial Regulatory Review –
Streamlining and Other Revisions of Part 25 of
the Commission's Rules Governing the Licensing
of, and Spectrum Usage By, Satellite Network
Earth Stations and Space Stations

IB Docket No. 00-248

REPLY COMMENTS

ICO Global Communications (Holdings) Ltd. ("ICO")¹ submits reply comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking in the above-captioned proceeding.²

ICO supports the Commission's efforts to streamline its satellite licensing process to encourage more rapid deployment of satellite services to the public. Although the Commission's objective can best be achieved by making its satellite licensing rules more flexible and less restrictive, a number of commenters support an approach that would achieve the opposite result.

Constructing and launching a satellite system is an extremely complex undertaking that requires flexibility to respond to the evolving markets for satellite services. It is arbitrary and inefficient to place satellite licensees and license applicants in

¹ ICO, a Delaware corporation, is the parent of ICO Satellite Services G.P., which is authorized to provide 2 GHz mobile satellite service in the United States.

² *Amendment of the Commission's Space Station Licensing Rules and Policies*, Notice of Proposed Rulemaking and First Report and Order, 17 FCC Rcd 3847 (2002) ("*NPRM*"). All comments filed on June 3, 2002, in these dockets will hereinafter be short cited.

a regulatory box designed to freeze in time the business plans and the market status quo that exists at the time the license application is filed. Market conditions and demand for satellite services evolve over time, and licensees must be allowed to react accordingly.

Specifically, ICO disagrees with those commenters that seek to maintain the Commission's inflexible and inefficient anti-trafficking rules. These outdated rules prevent satellite spectrum from being put to use by the satellite interests that value them most and thus should be eliminated. In addition, the Cellular Telecommunications & Internet Association's ("CTIA") disingenuous and arbitrary licensing proposals merely serve CTIA's on-going mission to grab spectrum from licensed mobile satellite service providers and should be rejected out of hand. The benefits that satellite service provide to the American public should not be forsaken simply because CTIA's constituents raise unsubstantiated claims of spectrum shortages.

I. THE ANTI-TRAFFICKING RULES SHOULD BE ELIMINATED

The anti-trafficking rules exacerbate spectrum scarcity and discourage more intensive and efficient use of existing MSS spectrum by preventing the transfer of spectrum to parties that value it most. As such, the anti-trafficking rules are entirely incompatible with the Commission's established policies of alleviating spectrum scarcity and increasing spectral efficiencies by "allow[ing] market forces to direct the distribution of spectrum resources among specific users and uses."³ As the FCC has explained, "a robust and effective secondary market for spectrum usage rights could help alleviate

³ *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Policy Statement, 15 FCC Rcd 24178, 24181 ¶ 10 (2000) ("*Spectrum Secondary Markets Policy Statement*"); see also *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Notice of Proposed Rulemaking, 15 FCC Rcd 24203 (2000) (initiating proceeding to examine proposals to facilitate leasing of spectrum rights).

spectrum shortages by making unused or underutilized spectrum held by existing licensees more readily available to other users and uses and help to promote the development of new, spectrum efficient technologies.”⁴ The Commission already allows licensees of most other commercial services significant flexibility in transferring their spectrum rights, and there is no legitimate reason why satellite licensees should be held to a stricter standard.⁵ In addition to the many other justifications cited by the Commission in favor of eliminating the anti-trafficking rules,⁶ ICO agrees with the Commission that the underlying purpose of the anti-trafficking rule – the prevention of “unjust”

⁴ See *Spectrum Secondary Markets Policy Statement* at 24178-79 ¶ 2.

⁵ For example, the FCC long ago abolished the anti-trafficking rule that presumed that the sale of a broadcasting station within three years of the acquisition of the license or permit constituted prohibited trafficking. See *Amendment of Section 73.3597 of the Commission’s Rules (Applications for Voluntary Assignments or Transfers of Control)*, 52 RR 2d 1081 ¶ 21 (1982), *reconsidered in part*, 99 FCC 2d 971 (1985) (“73.3597 Rules”). In 1989, the FCC declined to initiate a rulemaking proceeding to reinstate the broadcast anti-trafficking rule. See *Amendment of Section 73.3597 of the Commission’s Rules (Applications for Voluntary Assignments or Transfers of Control)*, 4 FCC Rcd 1710 (1989), *aff’d*, *Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 813 (D.C. Cir. 1990). More recently, the FCC eliminated its long-standing rule prohibiting for-profit sales of unbuilt commercial broadcast stations. See *1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23070 ¶ 30 (1998). In addition, the FCC generally does not review assignments or transfers of terrestrial-based, nonbroadcast, fixed and mobile wireless licenses to determine whether trafficking has occurred. See 47 C.F.R. § 1.948(i); *Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, First Report and Order, 15 FCC Rcd 17414, 17429 ¶ 33 (2000). Furthermore, cellular, broadband PCS, and other terrestrial wireless licensees are permitted, upon regulatory approval, to freely disaggregate and partition their licenses, regardless of whether the licenses are built out. See *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees*, Second Report and Order, 15 FCC Rcd 10432, 10433 ¶ 2, 10434-35 ¶ 4 (2000).

⁶ As the Commission observed in the *NPRM*, the anti-trafficking rules potentially prevent satellite licenses from getting into the hands of the parties that value them most and are best suited to put them to use in the shortest amount of time. See *NPRM* at 3884 ¶ 111. The rules also do not allow for changing demands in the telecommunications market (*id.*); discourage investment in satellite licensees (*id.* at 3885 ¶ 113); encourage satellite licensees with failed business plans to hold onto their licenses rather than assigning them to a party that would put it to use (*id.* at 3885 ¶ 114); and cause inefficient expenditures of human and capital resources by both licensees and the Commission itself in structuring transactions that comply with the cost-accounting requirements (*id.* at 3885 ¶ 115).

enrichment through the filing of speculative applications – can be better achieved through the implementation of reasonable milestones.⁷

Commenters supporting retention of the anti-trafficking rules rely on an outdated and overly restrictive licensing approach. For example, the Satellite Industry Association (“SIA”) contends that the anti-trafficking rules are necessary to deter speculative applications.⁸ SIA further contends that the rules do not inhibit “legitimate” transactions because they permit cost-based transfers and certain transfers where the original parties remain involved in the license operation.⁹ In fact, the high costs associated with developing a satellite system and preparing an acceptable license application discourage parties from filing satellite license applications for purely speculative purposes.

To the extent that anti-trafficking rules are intended to prevent delays in launching new services, their application in the satellite context can encourage a completely opposite result. The prohibition against transferring satellite licenses for profit eliminates an important means for alleviating risk that licensees and license applicants could use to attract potential investors.¹⁰ SIA’s logic suggests that the Commission should approve only those transactions involving spectrum licenses that do not produce a profit. This view is inconsistent with both the realities of attracting investment in a market-based economy and the Commission’s regulatory treatment of license transfers in non-satellite services. It is illogical to implement a more market-oriented license distribution system

⁷ *NPRM* at 3886 ¶ 116.

⁸ SIA Comments at 28-30.

⁹ *Id.* at 29.

¹⁰ As the Commission acknowledges in the *NPRM*, “If satellite companies are able to sell their licenses, i.e., “traffic” in their licenses, even before they have built and operated facilities, the risk of default on loans to bond holders or the non-payment of dividends to equity holders is reduced, and *Footnote continues....*

that is designed to ensure that licenses go to the parties that value them most and who presumably will bring satellite service to the public in the shortest possible time, yet deny parties the ability to charge some premium to account for the sweat equity they have already expended in developing the license.¹¹

II. THE COMMISSION MUST REJECT CTIA’S SPECTRUM CONFISCATION PROPOSAL

The Commission makes spectrum allocation and assignment decisions based upon demand and projected need, spurred by legislation, rulemaking petitions and, in the case of satellite spectrum decisions, spectrum allocations agreed upon at International Telecommunication Union World Radio Conferences.¹² Further, these decisions are predicated upon public interest determinations and a well-developed record of public comment. Construction requirements ensure that licensees put their spectrum to use and, in the alternative, that unconstructed licenses are redistributed to other applicants *in that same service*.

As part of its on-going efforts to persuade the Commission to confiscate spectrum that is internationally and domestically allocated for satellite services, CTIA submits various proposals that are based upon a presumption that all satellite applications are speculative and thus should be subject to a stricter standard than all other services. Specifically, CTIA proposes arbitrary milestone requirements, which, if not met by first round licensees, would subject the spectrum to “reclamation” by the Commission for

therefore those satellite companies may be more likely in the first place to be able to attract equity capital and to obtain loans at more attractive rates.” *NPRM* at 3885 ¶ 113.

¹¹ For this reason, the Commission should reject Intelsat LLC’s suggestion that the Commission should only allow cost-based license transfers. *See* Intelsat Comments at 17-19.

“other” – presumably, CMRS – uses. CTIA’s transparent assault on the Commission’s deliberative satellite spectrum allocation and assignment procedures should be rejected out of hand.

As a starting point, CTIA’s proposal to withhold approvals of second round license applications if first round licensees fail to meet their milestones arbitrarily holds subsequent applicants responsible for the actions of unrelated parties and must be rejected. Similarly, CTIA’s proposal to “reclaim” for “other” uses the spectrum of first round licensees that fail to meet their milestones arbitrarily attributes the problems of an individual applicant to the entire service. If the Commission managed spectrum on the basis of the success of initial entrants, it would have eliminated services such as Direct Broadcast Satellite (“DBS”), cellular, FM, and UHF long ago.¹³

CTIA presents no evidence or justification for subjecting satellite licensees to a stricter standard than other service providers, such as CMRS providers that fail to construct their licenses. CTIA suggests that other service providers, such as CMRS providers, would put satellite spectrum to faster use.¹⁴ However, significant amounts of

¹² See, e.g., *Amendment of Section 2.106 of the Commission’s Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, First Report and Order and Further Notice of Proposed Rule Making, 12 FCC Rcd 7388, 7389, 7393-95 (1997).

¹³ For example, the FCC allocated spectrum, adopted service rules, and granted its first authorizations for DBS service in 1982. See *Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference*, 90 FCC 2d 676 (1982); *Advanced Communications Corp.*, 11 FCC Rcd 3399, 3402 ¶ 5 (1995). During the “pioneering era” of DBS technology in the 1980’s, the FCC granted numerous extensions of its construction “due diligence” milestones. See *Advanced Communications Corp.* at 3408-09 ¶ 21. Under its DBS rules adopted in 1982, the FCC required each DBS permittee to satisfy a two-prong due diligence requirement. Specifically, the FCC required DBS permittees to begin construction or complete contracting for construction of their systems within one year of grant of their construction permits. DBS permittees also were required to commence operation within six years after grant of their permits. As a result, the first DBS system did not commence service until approximately 10 years after the FCC first granted DBS construction permits. *Id.* at 3409-10 ¶ 24.

¹⁴ CTIA Comments at 6-7.

terrestrial spectrum have lain fallow because licensees have delayed construction until the last minute. For example, the five-year construction deadline for the 1472 original D, E and F block PCS spectrum licenses won in Auction No. 11 fell on April 28, 2002. Several hundred of these licenses had not been constructed as recently as April 1, 2002. There is simply no evidence that CMRS providers would make more efficient or faster use of satellite spectrum.

Similarly, in contrast to the generally well-crafted and reasonable milestones adopted by the Commission for the 2 GHz MSS service, CTIA's milestone proposals appear designed to unnecessarily restrict satellite licensees and are merely another iteration of the double-standard that permeates CTIA's comments. For example, CTIA asserts that satellite licensees should be compelled to certify milestones on six-month intervals, and should be compelled to expend preset percentages of projected costs – including 25 percent during the first year.¹⁵ CTIA provides no substantive rationale in support of its proposals, but rather implies that such measures are necessary because satellite licensees have no market-based incentive to use spectrum efficiently and thus drag their feet in constructing their systems.¹⁶ In fact, contrary to CTIA's suggestion that market-based incentives alone (i.e. auctions) guarantee rapid construction of licenses, the majority of CMRS licenses won in Auction No. 11 were not constructed until shortly before the first five-year deadline expired despite the fact that the CMRS licensees paid for them at auction. Moreover, the substantial capital outlays that satellite licensees incur in designing and developing their systems provide a significant incentive to put the

¹⁵ *Id.*

¹⁶ *Id.* at 5-6.

spectrum to use. Moreover, these outlays often exceed the expenditures made by licensees in other services that obtain licenses via auction. For example, ICO's shareholders have already invested fully \$3.7 billion to get the ICO system off the ground, and have committed another \$1.4 billion to vendors. Further, ICO has met the *third* milestone for 2 GHz MSS licensees – almost three years ahead of schedule.

Finally, CTIA's proposal that the Commission should implement an internal program to monitor milestone compliance that includes on-site verification would needlessly expend the resources of both licensees and the Commission and cannot be reconciled with the Commission's stated objective of "streamlining" the satellite licensing rules.

CONCLUSION

For the reasons stated above, the Commission should eliminate the anti-trafficking requirements and reject the spectrum reclamation and other arbitrary and ill-considered proposals submitted by CTIA.

Respectfully submitted,

/s/ Lawrence H. Williams

Cheryl A. Tritt
Dave Munson
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006

Lawrence H. Williams
Suzanne Hutchings
ICO GLOBAL COMMUNICATIONS
(HOLDINGS) LTD.
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, D.C. 20036

July 2, 2002